Supreme Court, U.S.
FILED
FEB 5 2002
CLERK

(2)

No. 01-955

IN THE

Supreme Court of the United States

JACKSON BAYNARD,

Petitioner,

v.

ALEXANDRIA CITY SCHOOL BOARD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

JIMESE PENDERGRAFT SHERRILL
Counsel of Record
FRANCIS J. PRIOR, JR.
SICILIANO, ELLIS, DYER & BOCCAROSSE
Attorneys for Respondent
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692

172150

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

1838

TABLE OF CONTENTS

Page

Table of Contents i

Table of Authorities ii

Statement of the Case 1

Reasons for Denying the Writ 4

I. Actual Notice 5

II. Appropriate Authority 8

Conclusion 14

TABLE OF CITED AUTHORITIES

Page

Cases:

Banks v. Sellers, et al., 224 Va. 168, 294 S.E.2d 862 (1982) 12

Davis v. Monroe County Board of Education, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) 4, 5, 8

Farmer v. Brennan, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994) 6, 7

Franklin v. Gwinnett Cty. Pub. Schools, 503 U.S. 60, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992) 4

Gebser v. Lago Vista Ind. Sch. Dist., 524 U.S. 274, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998) ...4, 5, 6, 8, 9

Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982) 6

Rosa H. v. San Elizario Independent School District, 106 F.3d 648 (5th Cir. 1997) ... 6, 7, 8, 10, 11, 12, 13

Warren v. Reading School District, 82 F. Supp. 2d 395 (E.D. Pa. 2000) 10

Cited Authorities

Page

United States Constitution:

Eighth Amendment 7

Statutes:

20 U.S.C. § 1681, *et seq.* 1

20 U.S.C. § 1681(a) 4

Va. Code Ann. § 22.1-295(A) 12

Other Authority:

Va. Const. Art. VIII § 7 12

Respondent, Alexandria City School Board, respectfully prays that the writ of certiorari to review the opinion of the United States Court of Appeals for the Fourth Circuit, with respect to the liability of the Alexandria City School Board pursuant to Title IX of the Education of 1972, 20 U.S.C. § 1681, *et seq.*, be denied.

STATEMENT OF THE CASE

Craig J. Lawson was employed by the Alexandria City School Board during the 1990-1991 school year. He was employed as a sixth-grade teacher, at Charles Barrett Elementary School. Malone was the principal of Charles Barrett at this time. In March of 1990 Steven Leckie, a former student of Lawson's, met with Malone and informed her that Mr. Lawson was a pedophile and that Lawson had sexually abused him fifteen years ago. Mr. Leckie indicated to Malone that he had not pressed charges nor did he desire to pursue criminal charges against Mr. Lawson. Malone took notes during her discussion with Mr. Lawson but took no further action. At the time she received the report from Mr. Leckie, she "had some difficulty about the credibility of it." (R. 112) Malone had never received any similar allegations against Mr. Lawson. She did not report the alleged incident to Child Protection Services because of Leckie's wish not to become involved in a criminal investigation.

Within the next few days, Margaret Leckie, Steven's mother, called Malone to confirm her son's report. Malone asked Mrs. Leckie what she wanted to do about her son's report. From her discussions with Mrs. Leckie and her son, Malone decided not to take any immediate action. Malone decided that because "they were telling me this yet didn't want to do anything about it" (R. 113) the complaint was not credible and that the children in her school were not in any danger of abuse by Lawson. (R. 113)

Petitioner refers to a third report being made to Malone that Mr. Lawson was a pedophile, from a tall, blond, or fair-haired woman. Malone has no "direct recollection of that" (R. 116) and there is no evidence of who this tall, blond woman is.

In the fall of 1990, Baynard transferred to Charles Barrett Elementary and became a student of Mr. Lawson. Lawson started to molest Baynard within the first month of the semester and continued to do so until Baynard began college. Baynard was molested by Lawson on the school grounds before, during, and after school hours, as well as at Lawson's home and on camping trips.

In November of 1990, Lillian Newman, the school librarian, witnessed Baynard sitting on Lawson's lap before school hours one morning. Lawson's arm was around Baynard's shoulders, and their faces were close together. When Lawson noticed Newman observing the scene he immediately jumped up, letting Baynard slide to the floor. Mrs. Newman reported the incident to Malone later that day. Newman indicated that she thought the scene "possibly was inappropriate." (R. 115) Although there was nothing in the report from Ms. Newman that led Malone to believe there was sexual activity happening she spoke with Lawson about the incident. Lawson was very open about the incident and agreed that students should not be so physical. Lawson promised to talk to Baynard about more appropriate behavior.

In November or December of 1990, Rosemary Herman, a teacher at Charles Barrett Elementary, informed Malone that a neighbor told her that Lawson was a pedophile. Malone replied that "she couldn't tell [Herman] not to say anything about this, because it was out in the neighborhood." (R. 23)

It was not until this time that Malone became fearful for Lawson's students, "this sort of linked things for me. I had a report about something from a long time ago; I was now getting another report." (R. 116) In January of 1991, Malone informed the Alexandria City School Board's personnel director, Beckhoff, about the allegations made by Leckie in March 1990 and Herman's report. She also informed Beckhoff that Lawson was very physical with his students. Malone did not inform Beckhoff of the lap-sitting incident. Beckhoff immediately began an investigation. Malone was directed to keep all records of complaints and to monitor Lawson's activities. Malone walked the halls of the school several times in the morning and several times in the afternoon. She made a point to stop at Lawson's classroom. She watched him through the windows during recess. She also looked for notes from students on his desk when Lawson was not in the classroom. Baynard stayed after school with Lawson several times and often received a ride home from Lawson, however, Malone said she never saw them together. Malone did not observe any inappropriate behavior from Lawson during the time period she was asked to monitor him.

Beckhoff interviewed Leckie and his parents as well as the husband of the neighbor who had spoken to Herman. He also looked through Lawson's personnel file and contacted Lawson's previous school district. Beckhoff also contacted Child Protective Services, however, they could not investigate Leckie's allegations because Leckie was no longer a minor. Beckhoff next informed the Alexandria City Police Department but Leckie refused to have a tape-recorded telephone conversation with Lawson, and the investigation was closed for lack of sufficient evidence. Lawson resigned from the school at the end of the school year yet he continued to abuse Baynard until Baynard's freshman year in College. Baynard finally reported the abuse and Lawson was arrested and convicted.

REASONS FOR DENYING THE WRIT

Title IX pronounces "no person . . . shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a). Sexual abuse of a student by a public school employee is actionable sex discrimination under Title IX for which damages are available. *Franklin v. Gwinnett Cty. Pub. Schools*, 503 U.S. 60, 74-76, 117 L. Ed. 2d 208, 112 S. Ct. 1028 (1992). The Supreme Court identified the elements a plaintiff must prove in order to prevail under Title IX in *Gebser v. Lago Vista Ind. Sch. Dist.*, 524 U.S. 274, 141 L. Ed. 2d 277, 118 S. Ct. 1989 (1998). In *Gebser*, the Court held that "a damages remedy will not lie under Title IX unless an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of the discrimination in the recipients programs and fails adequately to respond." *Id.* at 290. Further, the recipient must be deliberately indifferent to the teacher's misconduct. *Id.*

Petitioner argues that lower courts have struggled and continue to struggle with interpreting the proper definitions of both "actual notice" and "appropriate authority" as applied in *Gebser* and that these standards should be made clear by This Court.

The "ambiguity" upon which Petitioner relies is merely an attempt to substitute a constructive notice standard for the actual notice required by this Court in *Gebser*. The Fourth Circuit had no difficulty with defining the notice required by *Gebser* when analyzed in conjunction with This Court's subsequent opinion in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999).

In determining the "appropriate authority" required by *Gebser*, the Fourth Circuit correctly examined Virginia law on this issue. Contrary to the assertion by Petitioner that the differing outcomes in the Courts below result from confusion, in actuality, any such variation is the natural result of differing statutory choices made by states in the distribution of authority in their school systems.

I. Actual Notice

The Court of Appeals for the Fourth Circuit did not find the term "actual notice" to be ambiguous: "to the extent there is any doubt about the nature of the actual notice requirement articulated in *Gebser*, it is removed by the subsequent opinion of the Court in Davis." Appendix A at 17a. In *Davis v. Monroe County Board of Education*, 526 U.S. 629, 143 L. Ed. 2d 839, 119 S. Ct. 1661 (1999) The Court held that under Title IX, a recipient of Federal education funds can be liable in damages "where it is deliberately indifferent to known acts of sexual harassment by a teacher." *Davis*, at 641. Liability for a school district under both agency principles and negligence principles were rejected, and The Court established that the district could be liable only for acts of which it had actual knowledge. *Id.* at 642.

Petitioner argues that the Fourth Circuit has adopted "the most stringent end of the spectrum for determining liability in Title IX" cases. Petition at 14. He further argues that the standard for actual notice recognized by the Fourth Circuit can only be satisfied by actual knowledge of current abuse. However, The Court of Appeals did not circumscribe the "actual notice" standard to current abuse as the petitioner suggests. Rather the standard, taken from Davis, encompasses known acts of both current and previous abuse. *Davis*, at 642. Nowhere is it declared that the acts of abuse must be contemporaneous with the notice.

Gebser offers further insight into the meaning of "actual notice" in outlining what it does not mean: "we declined the invitation to [hold] the district liable for its failure to react to teacher-student harassment of which it knew or should have known." *Gebser*, at 282. Petitioner points out that several lower courts have employed a standard which defines actual notice as sufficient evidence to deduce a school employee is a substantial or obvious risk to abuse children. Petition at 16. This standard, which petitioner would have the Court adopt, would be the equivalent of constructive notice, which the Court in Gebser refused to accept. To use a constructive notice standard would "frustrate the purposes" of Title IX. *Gebser*, at 288-89. In Title VII cases, a plaintiff can show constructive notice by demonstrating the "pervasiveness of the harassment, which gives rise to the inference of knowledge or constructive knowledge." *Henson v. City of Dundee*, 682 F.2d 897, 905 (11th Cir. 1982). Extending this standard to Title IX cases would mean that if the school district should have known about Lawson's abuse, or should have drawn the conclusion that he was abusive, it would be liable on the basis of its constructive notice of sex discrimination. Imputing liability to a school district under a theory of constructive notice is at odds with the fundamental objective of Title IX. *Gebser*, at 289. One of the key objectives of requiring notice is to prevent diverting education funding from salutary uses where a recipient had no knowledge of discrimination in its programs. *Id.*

In interpreting the meaning of actual notice in *Rosa H. v. San Elizario Independent School District*, 106 F.3d 648 (5th Cir. 1997), the Fifth Circuit looked at recent cases involving the concept of deliberate indifference. *Rosa*, at 658. The court examined *Farmer v. Brennan*, 511 U.S. 825, 114 S. Ct. 1970, 128 L. Ed. 2d 811 (1994), a case involving the

issue of what constitutes deliberate indifference when an inmate brings a suit against prison officials for conditions that violate his Eighth Amendment rights. *Id.* In *Farmer*, the Supreme Court found deliberate indifference to fall under the basic category of recklessness. *Farmer*, at 1978. The Court acknowledged a distinction between recklessness as failing to act in the face of an unjustifiably high risk of harm that is known or that is so apparent that it should be known and recklessness as disregarding a risk that is actually known. *Id.* The court adopted the latter, subjective test, holding that the official must both be aware of facts from which the conclusion could be drawn, and he must also actually draw the conclusion. *Id.* The distinction highlighted in this case helps show the difference between an intentional wrong and a wrong that occurs because of simple neglect. *Id.* The Fifth Circuit used this analysis to reach its holding that a school district has not sexually harassed a student unless it is knows of a danger of abuse and chooses not to lessen that danger. *Rosa*, at 659. The Court recognized that it borrowed analysis from a different area of the law, yet it felt that these cases "clarify the indispensable role that deliberate action plays when ability stems from intentional conduct such as punishing or discriminating." *Id.* The court held that Title IX liability will not exist if a plaintiff fails to show that the school district actually knew that the students faced a substantial threat of sexual harassment. *Id.* Put differently, a plaintiff will not succeed if the district can show that it did not know the underlying facts signifying a substantial danger or that it did know the underlying facts but believed (although unwisely) that the risk was insubstantial or nonexistent. *Id.*

Here Malone was aware of a report of alleged abuse occurring fifteen years ago. She believed there was no danger.

Arguably she had enough facts to draw a conclusion, but she did not draw the conclusion. She did not believe Leckie's report to be credible when he told her that he wanted to make her aware and did not want to pursue criminal charges. Petitioner alludes to four reports, however, as mentioned in the statement of the case above, the first two reports involve Leckie, Malone does not recall the third report being made, and the fourth report from Herman was when Malone took action. The lap-sitting incident was dealt with as Malone thought appropriate. She questioned Lawson about the incident and directed him to be less physical with students. When Malone received a complaint from Herman she took action and notified the superintendent. She monitored Lawson by walking by his room numerous times a day, watching him through the windows at recess and searching his room for evidence. Malone uncovered no evidence that Lawson was abusing Baynard or any of the other students. Malone did not have actual notice. She mistakenly believed the risk of abuse by Lawson to be insubstantial.

In looking to *Gebser*, *Davis*, and *Rosa*, as the appellate court did, the meaning of actual notice becomes clear. The petitioner is unable to show that Malone actually knew Lawson was a substantial danger to the students. What Malone should have known or should have concluded is immaterial.

II. Appropriate Authority

The Fourth Circuit correctly held that Virginia law does not empower principals with sufficient authority to deem them the proxy of the School Board under Title IX.

Petitioner also argues that a school principal is an appropriate authority to institute remedial measures for purposes of Title IX. In *Gebser* the Court carefully limits the scope of liability by holding "a damages remedy will not lie under Title IX unless an official who at minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient's behalf has actual knowledge of discrimination in the recipient's programs and fails to adequately respond." *Gebser*, at 290. The language employed by the Court, particularly the clause "who at minimum", indicates the intended restrictiveness of this standard. *Gebser* makes clear that many school employees are not officials "who at a minimum" have authority to take remedial action.

It should be noted that some of the facts in *Gebser* are analogous to the facts in the instant case. In *Gebser*, the victim did not report anything to the principal but two other students did. They complained to the principal about the teacher's inappropriate comments in class. The principal advised the teacher to be careful about classroom behavior, but did not report the parents' complaints to the school's superintendent. Only later, after it was discovered that the teacher was having sex with the victim, did the school terminate his employment. Similarly, Malone did not receive a report from the victim. She received other reports and advised Lawson to be careful about his behavior with the students, but she did not report anything to her superiors. The Court in *Gebser* concluded that there was no actual notice from the facts presented. The Court does not explicitly state whether a principal constitutes an appropriate authority, but the language of the court suggests that a principal, in fact, is not an appropriate authority: "[t]he only official alleged to have information about Waldrop's misconduct is the high school principal." *Id.* at 291.

Petitioner contends that this case should be heard because there is a lack of clarity concerning who constitutes an appropriate authority, which has resulted in confusion among the lower courts, which in turn "has left the lower courts to create tests on an ad hoc basis with differing results." Petition at 17. Petitioner cites *Warren v. Reading School District*, 82 F. Supp. 2d 395 (E.D. Pa. 2000) as the case which has held a principal to be an appropriate authority to institute remedial actions. A diverse result, one which petitioner does not like, is the decision by the Court of Appeals for the Fourth Circuit in the instant case. The Court of Appeals for the Fourth Circuit held that the principal was not an appropriate person to take corrective measures. Appendix at 19a. The Court further held that remedial measures must incorporate the power to hire and fire the offending employee for the official on notice to be an appropriate person. Appendix at 20a. In reaching their decision they agreed with the Fifth Circuit's holding in *Rosa*, concluding that the test of whether a supervisory employee may be seen as the proxy of the school district is whether or not the school district bestowed upon that employee the traditional powers of an employer. Appendix at 19a. The Fifth Circuit explained these traditional powers to be the authority to hire and terminate employees. *Rosa*, at 660.

Petitioner truthfully asserts that there are differing results among the Circuits. However, he fails to understand that this is natural. Schools are managed and operate differently from state to state. Within school systems, authority and power are distributed differently. *Gebser* did not list who was to be an appropriate person for these reasons. Likewise in *Rosa*, the court hesitated to establish firm categories:

> school districts contain a number of layers of responsibility below the school board:

> superintendents, principals, vice-principals, and teachers and coaches, not to mention specialized counselors such as Title IX coordinators. Different school districts may assign different duties to these positions or even reject this traditional hierarchical structure all together. We do not wish to restrict the applicability of our analysis by keying liability to certain job titles within the school system. Whether the school official is a superintendent or a substitute teacher, the relevant question is whether the official's actual knowledge of sexual abuse is functionally equivalent to the school district's actual knowledge.

Id. These cases should be examined on an ad hoc basis for school systems are not identical across the Nation. The Court of Appeals has looked at the facts of this case and has ruled very clearly that Malone was not an appropriate authority to take corrective actions.

Petitioner alleges that this "hire and fire" test will persuade other school districts to make sure that no one individual can hire and fire a teacher thereby shielding school boards from liability. The Fifth Circuit Court of Appeals addressed a similar concern in *Rosa*:

> [s]ome might suggest that the approach we adopt today creates incentives for school boards to stick their heads in the sand. Our response is two fold. First, we are not writing here as a common-law court. We are interpreting a federal statute. Second, school boards that adopt a head-in-the-sand policy would be foolish indeed,

> morality aside, because they would encounter other problems, such as the threat of liability under 42 U.S.C. § 1983.

Id. at 657-658.

Next petitioner argues that a principal should be the appropriate authority to receive notice in order to take corrective measures because the principal is the official who is responsible for the supervision of the employees and the school's operation. Petitioner quotes *Banks v. Sellers, et al.*, 224 Va. 168, 294 S.E.2d 862 (1982), "[t]he principal is, for his [or her] school, essentially a counter part of the superintendent . . . the function is very similar," in supporting his claim. This argument has two flaws. First, it assumes mistakenly that a superintendent has been classified as an appropriate authority. Second, it relies on an incomplete quotation. The quotation in its entirety reads, "[a] principal is essentially a counterpart of the superintendent, although, the fundamental authority is diminished and restricted, the function is very similar." Authority is the paramount issue here, as we are discussing who may be an appropriate authority, and here we are told that the fundamental authority of the principal is much less than that of the superintendent.

In Virginia, the State Constitution gives control of the school system to the school board. Va. Const. Art. VIII § 7. The principal of a public school is not the fundamental equivalent of the school district, and the principal must not be considered the proxy of the school district. The powers to hire, fire, transfer, and suspend teachers rest exclusively with the school district and the principal has no authority in such matters. Va. Code Ann. § 22.1-295(A) (Michie 2000). When a school board chooses who to furnish with the power

to handle such personnel actions, it is deciding who acts for the board. *Rosa*, at 660. The Court of Appeals felt that Virginia had made a cognizant decision not to give the principal the ability to act as an employer by not vesting him with the ability to hire and fire, "[s]imply put, Virginia has made an explicit policy decision that school principals do not exercise the powers of an employer on behalf of the school district." Appendix A at 20a.

In *Rosa*, the Court narrowed the class of appropriate employees to those "whom the school board has appointed to monitor the conduct of other employees, and, as distinguished from reporting to others, remedy the wrongdoing themselves." *Rosa*, at 660. Here the principal did not have authority to remedy the wrongdoing herself. She could not have fired or suspended Lawson. She could only report it to her superiors, but this is not sufficient to constitute an official decision by the school board. Anyone can report allegations of misconduct to their superiors. Petitioner argues that Malone could have taken corrective measures by removing Jackson from Mr. Lawson's class, informing Jackson's parents, or by ordering Mr. Lawson not to see or talk with students outside of class. Petitioner made these arguments at the trial court level and he raises them once again, unsupported by any evidence that Malone had authority to take any of these actions. Moreover the trial court found that these actions did not constitute "corrective measures", particularly with regards to the facts of this case. Because much of the contact occurred in school, mostly in the bathroom, and because the petitioner's parents were aware of the amount of time the petitioner and Lawson spent together, these measures would not have been adequate.

CONCLUSION

Admittedly the standards adopted by the Fourth Circuit Court of Appeals are stern. But using a more lenient standard would create too many risks. There would be a genuine risk that school districts would be liable in damages for its employees' independent actions, on top of their own official actions. In addition if a lower standard is accepted, there is a great risk that school officials will endanger school districts simply by their negligent actions. Finally, it is unsound to risk the federal funding of an entire school district when the school district does not have actual knowledge of the discrimination and the chance to cure it. For these reasons and those set forth above, the respondent urges The Court to deny this petition for writ of certiorari.

Respectfully submitted,

JIMESE PENDERGRAFT SHERRILL
Counsel of Record
FRANCIS J. PRIOR, JR.
SICILIANO, ELLIS, DYER
& BOCCAROSSE
Attorneys for Respondent
10521 Judicial Drive
Suite 300
Fairfax, Virginia 22030
(703) 385-6692